United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7287

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To be argued by
JUDITH S. KAYE

United States Court of Appeals
FOR THE SECOND CIRCUIT

NISHAT JUTE MILLS, LTD. and NATIONAL BANK OF PAKISTAN,

Plaintiffs-Appellees,

against

COSMIC INTERNATIONAL, INC.,

Defendant.

SONALI BANK and NISHAT JUTE MILLS, LTD.,

Plaintiffs-Appellants,

against

IRVING TRUST COMPANY and COSMIC INTERNATIONAL, INC.,

Defendants.

APPEAL OF THE DISTRICT COURT'S JUDGMENT
[One of consolidated appeals Nos. 75-7287, 75-7320, 75-7325 and 75-7363.]

BRIEF OF PLAINTIFFS-APPELLEES NATIONAL BANK OF PAKISTAN AND NISHAT JUTE MILLS, LTD.

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APPEAL OF THE DISTRICT COURT'S JUDGMENT

BRIEF OF PLAINTIFFS-APPELLEES NATIONAL BANK OF PAKISTAN AND NISHAT JUTE MILLS, LTD.

Issues Presented for Review

1. Was the court below correct in its determination that the act of state doctrine does not bar review of Bangladesh decrees which purport to seize and transfer ownership of property located in New York?

2. Was the court below correct in denying effect here to Bangladesh decrees allegedly seizing property located in New York, when those decrees are confiscatory?

Statement of the Case

During 1971, purchases of jute carpet-backing were made by a New York importer, Cosmic International, Inc. ("Cosmic") from Nishat Jute Mills, Ltd. ("Nishat"), a corporation in Pakistan. The goods were all shipped from Pakistan, arrived in the United States, were accepted by Cosmic and resold here prior to December 16, 1971, the date the new Bangladesh government gained control of East Pakistan. Only payment by Cosmic to Nishat remained to be made. Cosmic had agreed to make payment in New York, to the New York account of Nishat's bank, the National Bank of Pakistan ("NBP" or the "Bank").

Prior to actual payment, however, another claim to the proceeds was asserted. Sonali Bank and Nishat Jute Mills, Ltd. ("the Bangladesh plaintiffs") contended that Bangladesh decrees enacted during 1972 seized from NBP and Nishat ownership of the account receivable owing by Cosmic and transferred it to them.

Two actions were brought in the United States District Court for the Southern District of New York to recover the proceeds admittedly owing by Cosmic (a sum of $97,043.50), one by Nishat and NBP ("the Pakistani claimant") and another by the Bangladesh. On consent of the parties, these suits were consolidated. The material facts were substantially agreed upon by both sets of plaintiffs, in two stipulations filed with the court below (JA 138-246; JA 247-50).* After trial on October 21, 1974,

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* References to the Joint Appendix are as "JA". The Bangladesh plaintiffs' brief in this Court is referred to as "Brief".

(footnote continued on following page)

before the District Court, Hon. Charles L. Brieant, Jr., judgment was awarded to the Pakistani claimant. The opinion of the court below, dated March 31, 1975 appears at 392 F. Supp. 262, and at JA 19.

This appeal challenges the sound determination that, because the property allegedly seized by the Bangladesh decrees had its situs in New York, the court was not required to implement the decrees here if they contravened our own public policy. Finding the decrees confiscatory, the court correctly declined to give them force and effect with respect to the New York property, and found in favor of the Pakistani claimant.

While the Pakistani plaintiffs urge affirmance of the District Court decision with respect to the proceeds in dispute, they seek review (Docket No. 75-7325) of the decision regarding interest, which was awarded only from the filing of the complaint rather than from the dates on which Cosmic's obligation to make payment fell due. No separate brief is submitted on this issue, but reliance is placed on the arguments and authorities set forth in the brief of United Bank Limited (Docket No. 75-7363), filed in this Court July 7, 1975.

Counterstatement of the Facts

A. Identification of the Pakistani Plaintiffs

Nishat is a private limited company incorporated under the federal laws of Pakistan, which has always maintained its head office and registered office in Karachi, Pakistan

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(*footnote continued from preceding page*)

This consolidated action was tried jointly with another consolidated action in which other Pakistani and Bangladesh claimants raised conflicting claims to a different *res* in New York, and the court below also found in favor of the Pakistani claimant. The appeal from that decision (Docket No. 75-7320) is being heard together with the instant consolidated case.

(JA 139, ¶ 7; JA 212). Almost its entire shareholding has at all times been owned by citizens and residents of Pakistan (JA 140, ¶ 10). Among the products sold by Nishat was jute carpet-backing, manufactured at its mill in East Pakistan.

NBP is a banking corporation organized and existing in Pakistan, with its head office in Karachi, Pakistan. It was formed pursuant to its own statute—the National Bank of Pakistan Ordinance (JA 155-177)—with a central managing authority, subsidiary local regional offices (in Dacca, Lahore and Karachi*), and branches throughout Pakistan. While the Bangladesh plaintiffs note that NBP had approximately 255 branches and sub-branches in East Pakistan (Brief, p. 3), they neglect to mention that the Bank also had 498 branches and sub-branches in West Pakistan (JA 139, ¶ 5), and that—as the court below found—the existence and authority of *all* branches and sub-branches of NBP depended on the order of the Bank's central governing authority (JA 32; JA 176).

The Bank's shareholders during times material to this litigation were the Pakistan government (25%) and private shareholders, more than 90% of whom resided in West Pakistan (JA 138-39, ¶¶ 1, 4). For the past ten years, NBP has been qualified and licensed to do banking business in New York State, and maintains a branch at 100 Wall Street, New York City.

B. The Transactions in Issue

The goods purchased by Cosmic from Nishat were shipped from the East Pakistan port of Chittagong, ar-

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* Karachi and Lahore both were in West Pakistan, and Dacca and Chittagong both were in East Pakistan. Prior to December 16, 1971 East and West Pakistan were both part of the nation of Pakistan. The portion of Pakistan which was formerly East Pakistan has since December 16, 1971 been Bangladesh.

rived in the United States in five separate lots between September and early December 1971, and were resold here (JA 144, ¶ 24)—all indisputably before the fall of East Pakistan on December 16, 1971. As to each of the five shipments, the bills of lading were transmitted by NBP through its Dacca branch to Irving Trust Company ("Irving") in New York, with instructions to Irving to release these documents to Cosmic in exchange for its acceptance of drafts obligating it to make payment for the goods (JA 141, ¶ 14).

Each of the drafts was payable by Cosmic to "NBP-Dacca" (the branch of NBP located in Dacca), 180 days from sight. According to separate written instructions to Irving for each of the five shipments (JA 231-37), Irving was to collect the proceeds for NBP and credit them to the account of NBP's Head Office (Karachi), which account was maintained with Irving in New York City, and advice was to be given to the Dacca branch. As the parties have stipulated, in the ordinary course, the proceeds would have been credited to Nishat's account in the NBP Dacca branch (JA 141, ¶ 15) and the profits or losses of the Dacca branch would have been pooled with all other parts of NBP to determine the Bank's operating results (JA 142, ¶ 17).

The drafts obligating Cosmic to pay NBP were accepted by Cosmic in New York on September 7 and 8, November 9, and December 3, 1971 (JA 145, ¶ 27). Payments were due March 6, May 8 and May 31, 1972 (JA 145-49, ¶¶ 31, 36, 41, 46, 51).

C. Events in Pakistan and Bangladesh

On December 16, 1971, before any actual payment by Cosmic, East Pakistan, formerly part of the federal nation of Pakistan, became the nation of Bangladesh. The record is clear that until on or about December 16, 1971, Pakistan

was in *de facto* and *de jure* control of East Pakistan, and NBP retained control of its East Pakistan branches.*

On December 17, 1971, NBP advised all its correspondent banks that it had cancelled all authority of its East Pakistan branches (JA 150, ¶ 55). On January 21, 1972, the Head Office of NBP confirmed by telegram and letter to Irving (JA 398-99) that all authority of NBP's East Pakistan branches had been cancelled, and that payments should be made to its account in New York. Nishat sent a similar message to Cosmic (JA 400-01).

The Bangladesh decrees allegedly seizing the property of NBP and Nishat which remained in East Pakistan were not enacted until February 28, 1972 and March 26, 1972. The Bangladesh Abandoned Property (Control, Management and Disposal) Order, 1972 (JA 74), dated February 28, 1972, declared all property owned by Pakistanis to be "abandoned property". No provision was made for the payment of compensation to former owners (JA 150, ¶ 56).

On March 26, 1972, the Bangladesh Banks (Nationalisation) Order, 1972, *inter alia* created Sonali Bank, and vested it with all assets and liabilities of NBP remaining in Bangladesh immediately before the commencement of the Order (JA 150-51, ¶ 57). No compensation has been paid to Pakistanis in the years since that Order, and it is the position of the Bangladesh that no compensation

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* Any suggestion by the Bangladesh plaintiffs (Brief, p. 3) of the loss of control earlier is plainly refuted by the record. The proclamations of independence referred to in the Brief issued from India (JA 379-380). Obviously, had the Bangladesh government operating from India been in control of East Pakistan prior to December 16, 1971, there would have been no question of (a) communications between NBP's Head Office, Karachi, and its Dacca branch during December 1971 (JA 149, ¶ 54); (b) instructions from Dacca to Irving that the proceeds from Cosmic be credited to the account of the National Bank of Pakistan Head Office, Karachi; or (c) the cancellation of control by the Head Office on December 17, 1971 (JA 150, ¶ 55).

is due (JA 151, ¶ 58). On March 26, 1972, the Bangladesh Industrial Enterprises (Nationalisation) Order, 1972, decreed that all shares of Nishat Jute Mills not already vested in the Bangladesh government were at once vested in the government as sole shareholder, and its business, affairs and corporate powers were transferred to a new corporation created by that Order. No compensation has been paid to Pakistani citizens under that Order (JA 152, ¶ 59).

ARGUMENT

POINT I

The court below correctly determined that the act of state doctrine is inapplicable, and that it was not obliged to give effect here to confiscatory Bangladesh decrees.

Prior to the fall of East Pakistan, and long prior to the enactment of any of the Bangladesh decrees allegedly seizing property from the Pakistanis, the transactions between Nishat and Cosmic were complete except for payment. Payment was to be made by Cosmic, a New York resident, in New York, with the proceeds credited to the account of NBP maintained in New York.

On these facts, the court below properly determined that, the situs of the property seized being New York, it was not precluded by the act of state doctrine from inquiring into the validity of the decrees on which the Bangladesh claims rest. "The act of state doctrine is inapplicable because the situs of the debts was New York at the time the Bangladesh government attempted to seize them" (JA 26).

The consistent conclusion of our courts since *Underhill* v. *Hernandez,* 168 U.S. 250 (1897), has been that the act of state doctrine—a judicial creation—applies only to acts

done by a foreign sovereign within its own territory. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 416 (1964). The strict territorial limitation of that doctrine is amply confirmed by the description of its origins and evolution given by the Bangladesh plaintiffs themselves (Brief, pp. 11-13).

When property confiscated is outside the territory of the foreign sovereign and within the United States at the time of the attempted taking, our courts will give effect to the foreign acts with respect to that property, as a matter of comity, only insofar as they are consistent with the policy and laws of the United States. *Republic of Iraq* v. *First National City Bank,* 353 F.2d 47 (2d Cir. 1965), *cert. denied,* 382 U.S. 1027 (1966). As the Court pointed out in *Menendez* v. *Saks & Co.,* 485 F.2d 1355 (2d Cir. 1973), *petition for certiorari granted sub nom. Dunhill* v. *Cuba,* 416 U.S. 918 (1974), the act of state doctrine "does not protect a foreign state's attempted seizure of debts owed by persons outside of the foreign state's territory." *Id.* at 1364. Our "anti-expropriation policy applies with full vigor with respect to property outside the acting state." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 293 F. Supp. 892, 896 (S.D.N.Y. 1968), *modified,* 433 F.2d 686 (2d Cir. 1970), *cert. denied,* 403 U.S. 905 (1971).

In the present case, the property in issue was outside Bangladesh, and in New York, at the time of the expropriation decrees. In these circumstances, the conclusion reached below that the decrees are not immunized from review by the act of state doctrine was clearly correct and should be sustained.*

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* The same result obtains under the Hickenlooper Amendment, which the Bangladesh plaintiffs take great pains to try to distinguish (Brief, pp. 37-43). Expropriations of alien property without compensation are recognized as wrongful under international law. See Restatement 2d, Foreign Relations Law of the United States, §§ 185-87.

POINT II

The Bangladesh arguments raised to avoid judicial review of the decrees are without merit.

The court below properly rejected the arguments advanced by the Bangladesh plaintiffs to avoid review of the decrees.

A. There Is No Occasion to Depart From the Long-Established Rule Regarding Situs of A Debt

As the court below noted, locating a debt with the debtor is a rule firmly embedded in American jurisprudence, at least since *Harris* v. *Balk*, 198 U.S. 215 (1905). There is no cause in the present record to depart from this long-established precedent.

The principal authorities cited by the Bangladesh—*United States* v. *Pink*, 315 U.S. 203 (1942), and *United States* v. *Belmont*, 301 U.S. 324 (1937)—do not dictate a contrary result. In those cases, both of them involving Soviet decrees directed against the property of its own nationals, the result was determined in accordance with a compact concluded between the United States and Russia regarding the effect of Russian nationalization decrees on property in the United States. In the many years since *Belmont* and *Pink*, on facts more closely resembling the present case, our courts have reaffirmed that the situs of the debt is with the debtor. As recently as *Menendez*, *supra*, this Court specifically recognized that the situs of a debt is where the debtor is found, and the debt can be enforced and collected, a result which should be adhered to on this appeal.

Applying this principle, the lower court's findings and conclusions with respect to the situs of the debt in issue at the time of the expropriation decrees were clearly correct. Cosmic had its residence here; it received and resold the goods here; and it was to make payment here.

Even if this Court were to ignore long-standing precedents and locate the debt with the creditor, as the Bangladesh plaintiffs strenuously urge (Brief, pp. 14-19), still the award of judgment to the Pakistani claimant should be upheld. By the time of the Bangladesh expropriation decrees, the creditor, be it NBP, Nishat or Irving, was outside the territorial jurisdiction of Bangladesh. The Bangladesh contention that the creditor was located in East Pakistan because the branch of NBP in Dacca owned the account receivable from Cosmic, independent of the Bank itself, was soundly refuted by the record. As the court below found, a finding not claimed or demonstrated to be clearly erroneous "the East Pakistan offices of the National Bank of Pakistan were in fact branch offices, and therefore the debt owed to the Bank by Nishat was an account receivable of the Bank itself, not of the branch office in Dacca" (JA 33).

B. The Situs of the Debtor in the Present Case Was New York, and Not Bangladesh at the Time of the Expropriation Decrees

The Bangladesh plaintiffs seize on *dicta* from *Menendez* and *Republic of Iraq*, suggesting that a different result might have obtained if the debtors in those cases had been "answerable to the courts" of Iraq (353 F.2d at 51), or if at the time of the expropriation the debtors were present or subject to the jurisdiction of Cuba (485 F.2d at 1365). They argue that because Cosmic at some time theoretically might have been subject to suit on this debt in Bangladesh, Cosmic's debt should be located in Bangladesh rather than New York.

The court below properly rejected this argument, holding first that:

> "We do not believe that by these isolated statements, the Court intended to overturn a rule firmly embedded in American jurisprudence at least since

> *Harris* v. *Balk*, 198 U.S. 215 (1905). We reject the suggestion that, based on speculation about the result in a case that might have been brought in Bangladesh but was not, this Court should take a position at odds with long-established American precedent." (JA 36)

Second, even giving this argument its fullest measure, as the court below found, it was by no means clear that Cosmic would have been subject to jurisdiction in Bangladesh at the time of the expropriation decrees.

Cosmic is not and never has been a domiciliary, resident, citizen or national of Bangladesh (JA 141, ¶ 13). Its principal place of business during all times in issue has been New York City. Cosmic has no office or assets in Bangladesh and has not had any office or assets in that territory at any time relevant to this litigation (JA 143, ¶ 21). The Bangladesh argue that there is a basis for *in rem* or *quasi in rem* jurisdiction arising out of Cosmic's continuing purchases of goods F.O.B. Bangladesh ports. If this were so, it still would not establish that such jurisdiction existed at the time of the expropriation decrees. Moreover, the alleged continuing purchases F.O.B. Bangladesh were never proved; there was no stipulation on this point, but only the unproven and unsupported *contention* of the Bangladesh plaintiffs (JA 143, footnote).

Most significantly, as to both the alleged F.O.B. purchases and the visits to Bangladesh of Cosmic officers, no action was in fact taken against Cosmic and no assertion of jurisdiction was made in Bangladesh (JA 315-16; 325). To suggest that the expropriation decrees in and of themselves reached Cosmic, a foreign national, simply because of an abstract notion of jurisdiction, greatly strains the *dicta* relied upon. There is nothing in either *Menendez* or *Republic of Iraq* to support the far-fetched notion that the possible existence of jurisdiction, without more, automatically extends the sweep of decrees to foreign nationals

not even mentioned in them. Since the Bangladesh admittedly took no action to implement their decrees with respect to Cosmic within their own territory, there is no purpose to be served by speculating on whether or not the result might have been different, and how it might have changed, had the seizure been completed and brought to fruition there. The fact that the Bangladesh plaintiffs have invoked the aid of the New York court, and there is no doubt that the New York court can enter a judgment which will be recognized by the courts of Bangladesh (JA 314), makes this argument all the more illusory.

The final alleged basis for hypothetical jurisdiction over Cosmic in Bangladesh—this one also unproven—was Section 20 of both the Bangladesh and Pakistan Codes of Civil Procedure, a venue statute. This statute in relevant part* provides that "every suit shall be instituted in a Court within the legal limits of whose jurisdiction . . . the cause of action, wholly or in part arises." The Bangladesh plaintiffs argued that because part of the claim against Cosmic arose in East Pakistan, jurisdiction existed in Bangladesh to enforce Cosmic's debt, therefore locating the debt in Bangladesh.

This conclusion was stated by the Bangladesh law witnesses, and directly and authoritatively disptued by Mr. Haidermota, who testified as a legal expert for the Pakistanis. Citing two cases,* Mr. Haidermota concluded that

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* Additional arguments raised below that Cosmic was subject to suit under this statute because it transacted business in Bangladesh or that its acquiesced to jurisdiction because it did not say it would not submit to jurisdiction—both arguments shown below to be wtihout merit—are not raised on this appeal. Only the fact that the cause of action arose in Bangladesh is asserted as the basis for jurisdiction under Section 20 (Brief, p. 21).

* While the Bangladesh plaintiffs take issue with Mr. Haidermota's construction of the two decisions supporting his conclusion and opinion, the fact remains that their witnesses cited no case support for their own reading of the statute.

"with the present state of law, unless the Supreme Court were to overrule the decision in *Bubna More Company Limited,* I would say that the trial court—that is the subject court before whom the suit would be brought—would have to hold that it had no jurisdiction against Cosmic." (JA 340).* In suits against foreign corporations, Mr. Haidermota explained that the courts have held that the fact that a part of the cause of action arose within the territory would not be sufficient to confer jurisdiction over a foreign corporation which did not also reside there (JA 341-45). Since Cosmic maintained no residence in Bangladesh, in Mr. Haidermota's view there would have been no basis for jurisdiction there as Section 20 has been construed by the courts.

Thus, there is no occasion for the hypothetical, abstract discussion of the effect a United States court might have given to a Bangladesh judgment, if Bangladesh had jurisdiction over Cosmic and if it asserted that jurisdiction (Brief, pp. 24-31). Since it is by no means clear that there would have been a legitimate basis for such action, and since in any event no such action was taken, this argument furnishes no basis for relocating Cosmic's debt from New York to Bangladesh.

Commenting on the conflicting testimony of the law witnesses as to the construction of Section 20, the court below concluded that "litigants in the courts of the Untied States should not be subjected to such vagaries . . . When prop-

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* The *Bubna More* opinion (a decision of the High Court of East Pakistan, now Bangladesh) is reproduced in its entirety in the Joint Appendix, beginning at JA 407. The Bangladesh erroneously state (Brief, p. 22) that "on cross-examination Mr. Haidermota was forced to admit that the court dismissed the plaint in the *Bubna More* case because no summons or writ had been served on the defendant." On the contrary, as Mr. Haidermota testified (JA 349), the observations of the court relating to service did not in any manner detract from the holding of the case that, if a foreign corporation did not reside in the jurisdiction, it could not be sued there.

erty is located in the United States, the only law that can be applied with any certainty, and the law the Supreme Court has directed must be applied is our own" (JA 37).

C. The Bangladesh Effort to Identify A Different Debtor Should Not Change the Result

Finally, in an abrupt switch from the issue as thus far presented in the litigation, the Bangladesh plaintiffs now contend that the debt in issue is not even Cosmic's debt, but Nishat's debt, which they say was located in Bangladesh at the time of the expropriation decrees (Brief, p. 33*). Since the Bangladesh plaintiffs have themselves brought suit here against Cosmic as the debtor, since they caused an attachment of Cosmic's property in New York to secure its debt, and since the proceeds are being paid by Cosmic as the debtor, this new argument is inconsistent with and ignores the most obvious facts.

Even if the debtor is to be regarded as Nishat, however, the Bangladesh claims still should be denied.

By the time of the expropriation decrees, the debt of Nishat to NBP was clearly no longer in East Pakistan, if indeed it ever had its actual situs there. Prior to December 16, both Nishat and NBP had their principal places of business in Karachi, and a majority of the stock ownership of each entity was held by citizens and residents of West Pakistan. The legislation purportedly seizing NBP's assets in East Pakistan, according to the Bangladesh law witness, was the Banks Nationalisation Order dated March 26, 1972 (JA 313-14). This Order declared that undertakings of "existing banks" (defined to include NBP) that were "immediately before the commencement of this Order in the ownership, possession, power or control of the existing bank" shall be transferred to a specified "new bank".

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* This argument was not briefed or even raised below, and we therefore submit that it should not be considered on this appeal.

The "new bank" to which the undertakings of NBP were to be so transferred was Sonali Bank.

The Pakistani plaintiffs dispute that, as a branch of NBP, the Dacca branch at any time had independent ownership, possession, power or control of an undertaking belonging to NBP that was subject to seizure. But even if the Dacca branch at one time held such an interest, it no longer remained in the branch immediately prior to March 26, 1972, since by December 17, 1971, NBP had withdrawn all authority of its East Pakistan branches (JA 150, 398). Thus, while the Order may have reached buildings and physical assets remaining in East Pakistan, it could not have seized any interest in issue since months before its enactment all authority of the East Pakistan branches had been withdrawn. Nishat, owned principally by Pakistani citizens and residents, with its head office in Karachi, similarly cannot be said to have been in Bangladesh at the time of the expropriation decrees, for there have been no relations between the two nations (JA 152, ¶ 62).

Even assuming *arguendo* that the debt somehow lingered in East Pakistan without the debtor or the creditor, still this does not locate in Bangladesh the proceeds due from Cosmic, which were at all times payable in New York. There is nothing in this record to support the contention that the particular goods in issue were pledged as security for this debt.* Moreover, even if the goods were so pledged, a transfer of such a debt does not necessarily carry with it a transfer of the underlying security. Transfer of the underlying security may travel with the debt when that is the intention of the parties, but the seizure of the debt itself

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* The Bangladesh plaintiffs make the assertion that "this debt was also secured by a mortgage on Nishat's assets, including manufactured jute in transit and its proceeds, including the bills of exchange representing its proceeds, in favor of the local office of NBP at Dacca on December 29, 1971." (Brief, p. 5) There is no citation to, indeed no support in, the record for this statement.

would not also seize the security. See 2 G. Gilmore, Security Interests in Personal Property § 42.10 (1965).

The Bangladesh plaintiffs have not cited any authority for their contention that a seizure of a debt also carries away the underlying security. Neither of their cited cases—*Brainerd, Shaler & Hall Quarry Co.* v. *Brice*, 250 U.S. 229 (1919), and *Stillman* v. *Northrup*, 109 N.Y. 473, 17 N.E. 379 (1888)—stands for such a proposition. In both cases, there was a voluntary assignment for consideration, rather than a confiscatory seizure.

This Bangladesh argument—like the others raised to avoid judicial review of the decrees—involves the creation and construction of implied intentions, hypothetical possibilities, and abstract notions of what might occur if action were taken which in fact was not taken. Such speculation ignores not only long-established precedent but also the real facts. A debt was payable here by a New York resident which was purportedly seized in Bangladesh. For the Bangladesh plaintiffs to recover, the aid and intervention of a New York court is required to implement the Bangladesh decrees with respect to this property in New York.

In this situation, the act of state doctrine is inapplicable and, as the court below correctly ruled, it could give effect to foreign decrees only insofar as they are consistent with our own public policy.

POINT III

Because the Bangladesh enactments violate our laws and principles, they should be denied effect.

A. The Decrees Should Be Denied Effect Because They Are Confiscatory

The court below concluded that it was not obliged to give effect to the confiscatory decrees of the Bangladesh government, but "we may apply our own public policy,

which does not recognize the validity of governmental takings without compensation" (JA 30).

The Bangladesh decrees are clearly confiscatory. No compensation has been paid either to NBP or to Nishat. Under the Banks Nationalisation Order (JA 58), the law which allegedly vests in them entitlement to the proceeds due NBP (JA 313-14), the Bangladesh plaintiffs acknowledge that it is their position that no compensation is payable to Pakistani shareholders of NBP. As they have stipulated:

> "The Bangladesh plaintiffs claim that only NBP's shareholders registered in the branch register at Dacca are entitled to compensation under the 'Bangladesh Banks (Nationalisation) Order, 1972' (Exhibit 2 hereto), and that NBP shareholders registered in the branch registers at Karachi and Lahore are not entitled to any compensation." (JA 151, ¶ 58)

Similarly, there is no provision for compensation to Nishat. Under the Abandoned Property (Control, Management and Disposal) Order (JA 74), "abandoned property" means any property owned by any person who is a citizen of a State which at any time after March 25, 1971 was at war with Bangladesh. Since Nishat had its head office in Karachi and almost all of its shares were owned by citizens and residents of Pakistan (JA 140, ¶ 10), its property in East Pakistan would seem to fall within the definition of "abandoned property". There is no provision for payment of compensation (JA 50, ¶ 56).

Our courts have consistently expressed our strong policy against giving extraterritorial effect to foreign laws which are confiscatory. As the Court held in *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966):

> "Confiscation of the assets of a corporation has been said to be 'contrary to our public policy and

> shocking to our sense of Justice', *Vladikavkasky Ry. Co.* v. *New York Trust Co.*, 263 N.Y. 369, 378, 189 N.E. 456, 460, 91 A.L.R. 1426 (1934). . . . Our consituation sets itself against confiscations such as that decreed by Ordinance No. 23 . . . the policy of the United States is that there is no such thing as a 'good' confiscation by legislative or executive decree." 353 F.2d at 51-52.

In *Maltina Corp.* v. *Cawy Bottling Co.*, 462 F.2d 1021 (5th Cir. 1972), *cert. den.*, 409 U.S. 1060 (1973), owners of a brewery expropriated by the Castro regime sued to preserve their right to use their trademark, registered in the United States. The District Court held that plaintiffs lacked standing to bring the suit because the expropriation had included their right to the trademark. In reversing, Judge Wisdom stated,

> "it is settled by a long line of cases that 'our court will not give "extra-territorial effect" to a confiscatory decree of a foreign state, even where directed against its own nationals.' *F. Palicio y Compania, S. A.* v. *Brush*, S.D.N.Y. 1966, 256 F. Supp. 481, 488, aff'd mem. 2 cir. 1967 375 F.2d 1011 . . . Thus, 'foreign confiscatory decrees purporting to divest nationals and corporations of the foreign sovereign of property located in the United States have been denied effect in our courts.' " 462 F.2d at 1025.

See also *Compania Ron Bacardi, S.A.* v. *Bank of Nova Scotia*, 193 F. Supp. 814 (S.D.N.Y. 1961); *Zwack* v. *Kraus Bros. & Co.*, 237 F.2d 255 (2d Cir. 1956).

Because the Bangladesh laws are plainly confiscatory, the Court below properly declined to implement them as to the property here in dispute.

B. The Bangladesh Arguments That Confiscatory Decrees Should Be Given Effect Are Without Merit

The Bangladesh argue that, even if confiscatory, their decrees should be given effect here because there was no "taking", because expropriations are valid in wartime, or because both Pakistan and Bangladesh reject and abhor American law requiring compensation. All of these arguments are without merit.

Clearly upon the fall of East Pakistan there was a real taking of property and assets of both NBP and Nishat. The Bangladesh efforts to portray this seizure as a mere succession by a new bank "to its assets as maintained on the books of the branches" (Brief, p. 47) rests on the faulty premise that the assets of the National Bank of Pakistan located in East Pakistan somehow were the property of each of the branches rather than the Bank itself. They argue that, because for administrative convenience, loans may have been made and payable at particular branches, those branches individually owned the Bank's assets located there. There is no support for the assertion that prior to December 16, 1971, the banks operated under a system by which each branch office had its own assets and liabilities." (Brief, p. 46).

As the court below found, "the East Pakistan offices of the National Bank of Pakistan were in fact branch offices, and therefore the debt owed to the Bank by Nishat was an account receivable of the Bank itself, not of the branch office in Dacca" (JA 33).

There is extensive support in the record for this finding. The overwhelming evidence adduced by NBP to demonstrate that in ownership, management and operation it was a single entity is summarized in the opinion below at JA 31-33, concluding with the statement of the Bangladesh law witness himself (formerly legal advisor to NBP by appointment of its Central Board) that prior

to December 16, 1971 "there was only one bank called the National Bank of Pakistan." The contention that because they resided in East Pakistan, less than ten per cent of NBP's shareholders owned the assets of more than one-third of the Bank's branches which happened to be in that area is obviously not well founded.

NBP demonstrated not only that its Ordinance and By-Laws provided for a single entity but also that in actual fact the operation and management of the Bank rested with a central governing authority. Even advances by NBP to Nishat through the Dacca branch were made only upon the approval of the Bank's Head Office (JA 239-44).

Profits and losses of all branches were pooled to determine the profits and losses of the Bank itself; the Bank issued a consolidated Annual Report; and dividends were declared by the Central Board. None of these facts which were found by the court below (JA 32) and are soundly buttressed by the record are even disputed by the Bangladesh.*

Clearly, therefore, when the Bangladesh seized ownership of the assets of NBP in its East Pakistan branches, this was a real taking of property. Since it is the position of the Bangladesh that under their laws no compensation is payable to Pakistani shareholders of NBP (JA

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* Mr. Haidermota testified that under Pakistan law, a branch—the Dacca local office was indisputably a branch of NBP (JA 250, ¶ 4)—was not a separate person but was merely an agency of the banking corporation. Mr. Haidermota knew of no case holding that a branch could make a claim independent of and adverse to the corporation; indeed, he knew of no case where even such an argument had been made.

These conclusions and the authorities cited by Mr. Haidermota supporting these conclusions were unchallenged and undisputed, although there were at least two Bangladesh lawyers in attendance throughout the trial who could have challenged this testimony if there was any basis for so doing.

151, ¶ 158), it is indisputable that this taking of their property was confiscatory.

No similar argument is made by the Bangladesh plaintiffs as to the assets of Nishat in East Pakistan, which clearly were taken without compensation.

Several times, the Bangladesh plaintiffs make the baseless and factually erroneous argument that confiscatory seizures are valid under the law of Pakistan as they are in Bangladesh (Brief, pp. 8, 40, 44). This is contradicted by the record. While the Bangladesh Constitution provides for the "acquisition, nationalization or requisition [of property] with or without compensation" (JA 153), the Constitution of Pakistan provides as follows:

> "24. (1) No person shall be deprived of his property save in accordance with law.
>
> (2) No property shall be compulsorily acquired or taken possession of, save for public purpose, and save by the authority of law which provides for compensation or specifies the principles on and the manner in which the compensation is to be determined and given." (JA 154)

While under the Constitution of Pakistan the *adequacy* of any compensation provided may not be questioned (JA 154), this is quite different from the Bangladesh Constitution sanctioning taking without any compensation (JA 153). There is no evidence* that Pakistan, like Bangladesh, abhors our deep-seated principles regarding compensation.

Even if it were shown that both Pakistan and Bangladesh sanction confiscatory seizures within their own borders, still that would not oblige or be reason for our courts

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* Any statements which may have been made to counsel for the Bangladesh plaintiffs are not evidence, and not a subject for judicial notice under the Federal Rules of Evidence (Brief, p. 46).

to give effect to such seizures with respect to property located here.

The Bangladesh plaintiffs require the aid of this Court to implement and bring to fruition their confiscatory decrees since the property allegedly seized was located in New York. When our own courts are called upon to give effect to foreign acts, it is appropriate first to consider our own national policy. An American court clearly need not give effect to acts of other nations which are repugnant to our own principles of due process and equal justice, if those acts have not been fully executed within the borders of the foreign nation. See, *e.g., Zwack* v. *Kraus Bros. & Co.,* 237 F.2d 255 (2d Cir. 1956); Restatement 2d, Foreign Relations Law of the United States, §§ 41, 43 (1962). If nations at war take action within their own borders, no matter how justified they feel such acts to be, this still does not mean that American courts must implement those acts as to property which is located here, if to do so would emasculate our own public policy.

In light of the strong pronouncements by our courts, there can be no doubt that confiscatory seizures violate our most fundamental principles. Indeed, "no state has been stronger in its opposition to foreign confiscation decrees than New York. [Citations omitted.]" *Republic of Iraq* v. *First National City Bank,* 353 F.2d at 53.

Thus, the conclusions reached by the court below that the act of state doctrine is inapplicable, and that the Bangladesh decrees would not be implemented because they are confiscatory, were clearly correct and should not be disturbed on appeal.

Conclusion

The decision of the court below awarding the proceeds in dispute to the National Bank of Pakistan should be affirmed, and interest on that amount should run from the dates of non-payment by the debtor.

August 7, 1975.

Respectfully submitted,

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(58391)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NISHAT JUTE MILLS, LTD. and
NATIONAL BANK OF PAKISTAN,
Plaintiffs-Appellees,
against
COSMIC INTERNATIONAL, INC.,
Defendant.

SONALI BANK and NISHAT JUTE MILLS, LTD.,
Plaintiffs-Appellants,
against
IRVING TRUST COMPANY and
COSMIC INTERNATIONAL, INC.,
Defendants.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes and says that he is over the age of 18 years. That on the 7th day of August, 1975, he served two copies of Brief of Plaintiffs-Appellees National Bank of Pakistan and Nishat Jute Mills, Ltd. on Nierenberg, Zeif & Weinstein, Esqs., the attorneys for Appellants by delivering to and leaving same with a proper person in charge of their office at 230 Park Avenue in the Borough of Manhattan, City of New York, between the usual business hours of said day.

David F. Wilson

Sworn to before me this
7th day of August, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976